# LEGAL THEORIES AND SOCIAL SCIENCE.[1]

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A GREAT deal of discussion has arisen within the last decade as to whether the law has kept up with the changing conditions of American life. The discussion in this paper is part of the related but distinct question as to whether American legal thought has adequately kept in touch with the progress of the scientific mode of thought which is now permeating other fields of human endeavor, such as technology, medicine, etc. The complaint that the law is not adequately adapted to present economic and social conditions is by no means peculiar to this country. The European press is full of it. But the complaint that legal thought is behind and altogether out of tune with the general current of scientific thought is peculiarly true of our own country. This is not said in the spirit of querulous fault-finding—a vain form of intellectual self-indulgence that is of no assistance to the philosophic understanding. When one reflects that the essential task of the American people has been the conquest and annexing to civilization of a vast continent, and when one remembers the large share lawyers have had in organizing and carrying on civil government in this continent, as well as advising and helping in the organization of business, one is not inclined to blame them for not having had the opportunity as a class of keeping up with the general level of European thought. We must remember, that until a generation ago we had no real universities in this country. This, however, is no reason why we should now continue that glorified provincialism which confidently supposed that we had nothing to learn from European thought and experience in private and public law.

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In the introduction to his edition of James Wilson's Law Lectures the present Secretary of the American Academy of Jurisprudence says in effect:—Why should we studyEuropean political science? Have we not advanced far beyond them in the discovery of the ultimate truths of government? Anything they would have to offer us would be like "carrying coals to Newcastle." Yet, a close examination of Wilson's own lectures, which Mr. Andrews rightly holds as one of the sources of the American theory of government, shows that they contain very little that was not directly or indirectly borrowed from Grotius, Burlamaqui and Puffendorf. And not only Wilson but John Adams, Story and Kent, as well as Blackstone, borrowed freely from the Dutch and French writers of the eighteenth century. In a recent number of the Harvard Law Review,[2] Surrogate Fowler warns the American lawyer against the study of European philosophy of law, contending that such study is misleading because American law is different from European law. But, would any reputable geologist contend that we must not read European books on geology because that continent is not as old as our own, or would any self-respecting biologist warn us against reading European books on biology because the flora and fauna of that continent is different from ours? Of all works of vanity, the erection of a dead Chinese wall around the American legal intellect is the vainest. It is certainly ludicrous for us to stand up and shout that we have made the final discovery in the science of law when, as a matter of fact, we are only wearing the cast-off forms of eighteenth-century European thought. Whatever may be true of other things, science like truth ought to be international.

But, what have lawyers to do with European thought or general scientific thought altogether? According to the prevailing theory here, law is law and is in no way dependent on social and philosophical science. The existing law at any time is supposed to be a completed system regulating

[2] June, 1914.

the whole of life. Judges, assisted by counsel, simply declare what the law is, and to do this a good knowledge of the existing law is sufficient. This view, however, rests on a number of theories, the chief of which are the following:

1. The theory of the division of power as the condition of free government.

2. The theory that the judge's business is to declare the law, never to make or change it.

3. The theory of natural rights, which maintains that man has rights independent of the existence of organized society, and that the only legitimate function of the latter is to protect these rights; and, therefore, a written constitution with a bill of rights, or legal restraints on the legislative power, constitutes the best form of government.

There are many who regard it as impious or unpatriotic to question these principles; but it is not necessary to discuss the justice of this conception of respect for the wisdom of our ancestors, which conception, by the way, is more fully developed by the Chinese. I need only point out that in Western science the successful challenging of first principles is the greatest service we can render. In our own day, physics has been transformed by the fact that men have questioned the principles of the Newtonian mechanics; modern geometry has been developed by disregarding Euclid's axioms; and logic itself has recently found a larger career of scientific usefulness by getting beyond the limitations of Aristotle's assumptions. If loyalty and intelligent appreciation of the works of Newton, Euclid and Aristotle do not preclude questioning their first principles, why should an intelligent appreciation of the works of Marshall, Story, or Kent preclude us from questioning *their* first principles?

## I. The Theory of the Separation of Powers.

The prevailing attitude to this theory was well expressed by the late Justice Lurton in an article in the North American Review:[3] "Nearly half a century before our federal

[3] Vol. 193, p. 13.

constitution emerged, Montesquieu formulated upon unanswerable philosophical and historical considerations the dogma that neither public nor private liberty could be maintained without a division of the legislative, executive, and judicial functions of government."

An examination of Montesquieu's argument[4] shows that the supposed unanswerable philosophical and historical considerations are nothing more than a misinterpretation of the British constitution of his day, and an exaggeration of a very questionable political doctrine of Aristotle.[5] Montesquieu thought that the British constitution embodied such a division of power. As a matter of fact, it did nothing of the kind. The Judges of England were independent of the crown, but not of parliament, and there was certainly no sharp separation even then between the legislature and the executive. Montesquieu was a man of wide but very inaccurate learning—witness his treatment of the Roman law. The exquisite character of his style was responsible for the spread of many a vague and false generalization, but modern political science has got beyond his method of free and easy generalization from one or two inaccurately observed instances. Not only does history show no example of any form of government where the three powers were really sharply separated, but modern political science has learned a general distrust of the naive rationalism which supposes that the complicated facts of government can be readily and sharply divided into air-tight *a priori* compartments.

But you may say: Whatever the origin of the theory of the division of power, it has become embodied in our Federal and State constitutions and is, therefore, no longer a theory but a legal fact. Unfortunately, the situation is not so simple, for not even the might of a written constitution can make a false theory work smoothly. A complete separation of the organs of government, as even the writers of the *Federalist* recognized,[6] would lead to three separate

[4] Esprit des Lois, XI, c. 6.

[5] Pol. VI, c. XIV.

[6] *Federalist*, No. 47.

attempts at government resulting in anarchy. The framers of the federal constitution gave the president a share in legislation, and one branch of congress a share in the administration (through the power of confirming or rejecting executive appointments), but these exceptions have not been enough. The executive now makes all sorts of laws in the form of departmental regulations; and in such matters as the use of the mail, on which a man's entire business may depend, executive officers exercise almost complete judicial power. On the other hand, our legislators, by controlling appropriations, determine executive policies, while our courts control administrative matters through mandamus proceedings, and administer a large part of the business of the country through receivers. Through the power of determining what is a reasonable return on an investment, Judges practically decide the price of gas, railway rates, etc. As conservative a thinker as Judge Baldwin admits that in no state are the functions of our courts purely judicial.[7]

The result of thus maintaining a theory and not allowing its logical consequences to interfere with the necessities of practice has been to breed a confusion which would be regarded as scandalous in any other science. Thus Story in his Commentaries,[8] after laying it down as "a maxim of vital importance that these powers should be forever kept separate and distinct," goes on later to point out that the true meaning of this maxim is that "the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." Courts also usually begin by paying homage to this maxim and then quietly disregard it. Thus one court says,[9] "While it is true that the executive, legislative and supreme judicial power of a government ought to be forever separate and distinct, it is also true that the science of government is a practical one," etc.

[7] *The American Judiciary*, p. 22.

[8] *Com. on the Constitution*, I, 364, 368.

[9] *Brown* v. *Turner*, 70 N. C., 93. That necessity takes precedence over the Constitution is shown in *Head* v. *Amoskeag Mfg. Co.*, 113 U. S., 9.

My friends, the teachers of political science, assure me that the inconsistency of judges in enforcing this and other *a priori* maxims is the only thing that has made some sort of government possible. But on purely logical grounds it is hard to see any reason of preference between the anarchy of a government trying to function with three separate and distinct organs, and the higher lawlessness of courts overruling the Constitution which they profess to guard.

It has been claimed that in practice our party system has abolished the theoretical division of powers just as the extra-legal national convention system has in effect abolished the constitutional provisions for the election of the president. But the confusion of responsibility which all competent observers agree in placing at the root of all the short-comings of our system of government, shows that we have by no means solved the problem of getting rid of the effects of our maxim in practice. Doubtless the party system has accomplished something in the way of funded responsibility, but the extra-legal character of its leadership and control has been an insuperable handicap to its efficiency. The fact that we profess the theory of the separation of powers and of the responsibility of all officers to the people directly, gives strength to the perennial crusades of reformers against "bossism" and makes the position of the party leader unattractive to the type of man who in England or France would aspire to the position of prime minister. The double life of an extra-legal union and legal separation, works as badly in the state as it does in the family.

A recent device to overcome this division of responsibility is that of government by commission. Commissions like the Interstate Commerce Commission, the Wisconsin Industrial Commission, the various public service commissions, boards of health, etc., all really combine limited administrative, legislative and judicial power. They initiate investigations, formulate rules and regulations, and pass on the question whether these rules have been complied with. But while courts have been in the main liberal in

allowing such commissions to flourish, the fact remains that if the maxim of the division of power and its corollary (that legislative power may not be delegated) were strictly enforced, the life of these commissions would be impossible. As it is they live in a sort of legal twilight.

How we are to be relieved of the difficulties resulting from thus professing a false theory while endeavoring in practice to disregard it, is a problem for the statesman rather than for the philosopher. Seeing that all other civilized nations enjoy the blessings of liberty without professing this tripartite division of powers,[10] the philosopher can view with unconcern the entire abandonment of the theory.

## II. The Phonograph Theory of the Judicial Function.

Closely connected with the theory of the division of power, but of greater antiquity is the theory of the judicial function tersely expressed by Senator Root: "It is not within the judge's function or within his power to enlarge or improve or change the law." I am not insensible to the motives which make for this view, according to which the judge is a sort of impersonal phonograph who merely repeats what the law has spoken into him. Social necessities demand that the law should be certain, uniform, and free from the personal bias of the magistrate. Hence the fiction that all judicial decision merely declares a pre-existent law may be in some respects useful. But that the statement in question is not true, and like all fiction leads to confusion, seems to be as demonstrable as any proposition about human affairs is demonstrable. If judges never make any laws, how could the body of rules known as the common law ever have originated or have undergone the changes which it has? The whole history of the common

[10] French publicists frequently use the maxim of the division of power, but only to confine the judiciary to purely private litigation and prevent the civil courts from interfering with administrative matters which are dealt with by special administrative courts. They do not profess to separate the executive from the legislative power.

law is the history of continuous creation and modification of the law through judicial decision. One need only mention such topics as the law corporations, suretyship, the liability of common carriers, the law of sales, or the law of trade disputes to recall to the minds of lawyers the great changes that have only recently taken place in the law, quite apart from statutory legislation. These changes have been necessitated by the changed conditions of industrial and commercial life and the courts have consciously or unconsciously changed the law accordingly. And even in those branches of the law that do not directly bear on the industrial order, great changes have taken place; in the law of marriage and divorce and in the law of evidence the books of Messrs. Bishop and Wigmore have caused the legal profession to entertain new views on these subjects and the law has changed accordingly. Even in the supposed relatively fixed branches of law, such as property, contracts, equity, criminal, torts, and civil liability, no teacher of the law could adequately present the leading principles of his subject if he left out the leading cases of the past twenty years.

The view that it is not within the functions of the courts to make law, could be maintained only if judges were free to say to the parties before them: Gentlemen, the case you present involves some novel points. The law as a human product is not endowed with omniscience and has not foreseen the situation which you present, hence, I can give no judgment. Go to the legislature and have a law on the subject enacted.—Such a situation, however, would undermine the social value of courts of law. Hence so long as the decision serves as a precedent for others, courts are bound to make law, and so long as they are bound to make law, it is better that they should do so with open eyes rather than wilfully blind themselves to what they are doing by the use of plausible fiction.

In thus showing that Judges do and must make law, I do not, of course, wish to maintain that they are in no wise bound, and can make any law they please. Every one who

is engaged in making or creating something is limited by the rules of the process and by the nature of the material. But this is also true of the legislature. If the law made by judges presents a greater continuity with the past, the difference is one of degree rather than of kind. There is a great deal less novelty in legislation than is usually supposed. The amount of legislation in our country seems enormous, but most of it is not legislation at all, but attempts at administration. Careful studies of comparative legislation by Dicey, J. Brown, Charmont, Duguit and others show that so far as legislation does change the substantive law, it is not entirely arbitrary, but does move somehow according to definite directions. The root of the fallacy underlying the phonograph theory of the judicial function consists in ignoring this difference of degree and falling back on the naive rationalistic dilemma: either the law is the creation of men and completely arbitrary, or else it is completely determined by some mysterious non-human agency. And so the theory goes on and supposes that the work of the legislature is entirely arbitrary and that the work of courts is entirely predetermined. But human life does not present us with any instances of absolute fixities or absolute mobilities, any more than physics can present us with immovable bodies or irresistible forces. It is doubtless of the greatest social importance that the arbitrary element in the law, or in certain provinces of it, should be eliminated as far as possible. This, however, in no way justifies the sweeping assumption that the human element can be eliminated altogether. The idea of a government of laws without men—a sort of transcendental automaton which once wound up will go on forever without any human intervention—is one of the vainest illusions which the eighteenth century's enthusiasm for mechanical maxims imposed upon the spirit of men.

So far we have concerned ourselves with the common law; but, you will ask, how about the statute law which is the expression of the determinate will of the legislature? Here surely the business of the judge is to declare what the

law is, not to make or change it. A closer examination of the situation shows, however, that the theory of complete judicial passivity has as little justification in the realm of statute law as it has in the realm of common law. In the last analysis it is the court's interpretation and application of the meaning of a statute that constitutes the law rather than what the legislature said or actually meant. The theory of judicial passivity in the interpretation of statutes can be defended only on the assumption of legislative omniscience, that it is possible for the legislature to foresee all the various situations that can arise under the act and to make definite provisions for all possible cases. Experience shows that this is not so, but rather that it is impossible for any human body to forsee all possible situations and express its intention with regard to them in unambiguous terms. Hence, if judges are to make workable law out of statutes, they must in effect indulge in a process of supplementary legislation; they must invent a meaning where the legislature, which did not foresee the actual case, had none. As a matter of fact, the will, or even intention of the legislature is often irrelevant in the determination of the meaning of the statute. If I have a doubt of the meaning of a passage in a book, I consider myself fortunate if I can ask the author himself, but for a court to ask the legislature what it meant in a given statute would be absurd. If, while the court is deliberating over the meaning of a statute, the same legislature that enacted it should send to the court an authorized statement of what was its real meaning, such a statement would, under the ruling of Chancellor Kent,[11] be of no force. The courts are concerned not with the actual intention of the legislature, but with what the public, taking all the circumstances into account, should have acted on and should continue to act on. Indeed, we may as well recognize in passing that the intention of the legislature is a more or less fictitious entity. The drafters or framers of a law, the committee that reports it, the majority of the members of the two

[11] *Dash* v. *Van Kleek*, 7 Johns. R., 471, 512.

houses that for various reasons pass it, and the executive that signs it, may and frequently do have altogether entirely different ideas, or lack of ideas, as to the meaning of the statute they co-operate in passing,—hence the wisdom of the rule which excludes parliamentary debates in the determination of the meaning of the statute.

If we once recognize that no human agency can foresee all future contingencies and adequately provide for them, it becomes clear that if statutes are to be developed into workable laws, a continuous process of supplementary legislation and gradual amendment is necessary. In England and continental countries, which are untroubled by the dogma that legislative power cannot be delegated, a great deal of this supplementary legislation is left to executive officers. In our country all this must be effected by courts under the guise of interpretation. But all legal systems, if they are to be workable, must necessarily leave to the Judge, who has had a chance of seeing how the statute has worked in the concrete case, some power of adjusting the statute to life. Mechanical theories of the judicial function may hinder, but they cannot prevent this process from taking place. The whole history of the law from the Statute De Donis, and the Statute of Uses, or the Statute of Frauds, down to our own Sherman Anti-Trust Law illustrates this process.

It is frequently said, nowadays, that the old methods of equitable interpretation used by common law judges to correct or supplement the abstract generality of the statutes before them, have been abandoned. But, does not the well established rule and practice that an inconvenient and inequitable interpretation is to be avoided, or that the spirit rather than the letter of a statute is to be enforced, amount to the same thing? The extent to which this latter rule is carried can be seen in the fact that courts will in the interests of equitable interpretation change the tense of a statute,[12] interpret the phrase "single man" to include "widows,"[13] or the term "woman" to exclude "married

[12] *Malloy* v. *Chicago & N. W. R. R. Co.*, 109 Wis., 29.

[13] *Silver* v. *Ladd*, 7 Wall., 219.

woman,"[14] etc. Nothing is more usual than to find statutes construed as operating between certain persons only, or for certain purposes only, when the language of the statute expresses no such limitation.[15] Similarly we find the language of statutes stretched to include things which were not known to the legislator, and could not have been contemplated by him when the statute was passed; for example, when the word "telegraph" is held to cover the telephone invented subsequent to the law in question.

And not only in the interpretation, but also in the application of statutes, the judge's own views of justice and public policy must necessarily play a large part.[16]

If the theory that judges have no share in the making of statute law breaks down, what shall we say of the theory that they have no share in the making of constitutional law? In view of the great uncertainty which always prevails not only among the educated public, but even among the members of the bar as to how our courts of last resort will rule on a question involving, let us say the police power, how can we say that what the court does is simply to declare a pre-existing will of the people? I can understand the theory that after the court has ruled, its ruling should become the will of the people. But the theory that the court always acts as the mouthpiece of a pre-existing definite will of the people, is at variance with all we know of popular psychology. How can we blink at the fact that on most questions involving the constitutionality of laws the majority of the people have no will at all because they have never thought of the matter and have no opinion either way?

Moreover, the distinctions which constitutional issues involve are often of a kind that could not possibly have been present in the minds of the people. It is absurd to maintain that when "the people" in 1789 adopted the Federal Constitution with its commerce clause, they actually in-

[14] *Rex* v. *Harrold*, L. R., 7 Q. B., 36.

[15] See cases quoted by Maxwell, Stat. Interp., 115, 118, 163–168, and W. H. Loyd in 58 Univ. of Pa. Law Review, 76.

[16] For a detailed treatment of these points see my paper on the Process of Judicial Legislationi n the *American Law Review*, March, 1914, esp. pp. 178–189.

tended to give Congress authority to prohibit lotteries (an honorable and established institution in those days), but not to regulate life insurance, to order railway companies to install all sorts of safety appliances, but not to prohibit them from discharging their men for joining trade unions. Secular history gives no support to the view that when the Reconstruction leaders forced through (in effect at the point of the bayonet) the fourteenth amendment to the federal constitution, presumably to protect the civil rights of the negroes, "the people" actually intended that states should not have the rights to prohibit bakers from working more than ten hours per day, but should have the power to prohibit miners from working more than eight hours per day, or that the states should have the power to prohibit women from working more than ten hours a day, but no power to prohibit them from working at night.

The process of adopting a constitution is frequently spoken of as if it were a magical or supernatural procedure. It is, however, subject to all the frailties of human nature. A constitutional convention meets. Various delegates are specialists in specific provisions on which they have definite views and knowledge. These views they will successfully press on those who are specially qualified to deal with other matters. Hence every part of the constitution is the work of relatively few hands. When differences of opinion arise, as in the federal convention, compromises are effected which leave no one completely satisfied. This constitution is then presented to the people and they must vote in most cases either to accept or reject the whole thing. How many of those who vote for approval have had the opportunity to examine carefully every provision and consider all its possible consequences? Moreover, supposing that they do so it does not follow that because they vote for it, it expresses their will, since the voters have no power to select freely the provisions which they approve, and reject those that they do not.

The matter is even worse in case of the federal constitution which in spite of the fact that it begins "We, the

people," was never adopted by the people directly. It was adopted as a matter of fact by specially elected conventions which in states like Massachusetts required considerable political jockeying not much different from that which characterizes political conventions of our own day. Historians of unquestioned conservatism like McMaster, President Wilson, Ford and others, have shown that the federal constitution was pushed through by a well organized group of urban and wealthy people against the apathy and opposition of the lower agricultural classes. Please understand me. I am not now raising the issue whether our constitutional system has been of benefit to the country or whether it should or should not be continued. I am merely trying to show the fictitious nature of the argument which says that every judicial decision is the expression of the will of the people and that judges have nothing to do with making the law what it is. Surely devotion to one's country, or to the institutions which happen to be established, does not involve that one should adhere to inadequate arguments on their behalf.

The reason why all these arguments must logically break down is that they ultimately involve two contradictory absolutistic conceptions of what is law. One is that the law is the will of the sovereign and the other that law is eternal reason or immutable justice. The notion that whatever pleases the sovereign is law comes to us from the Byzantine period of Roman Law. The eighteenth century writers simply put the people in the place of the absolute emperor. The notion of law as reason comes to us from the Stoic philosophy. Ever since Blackstone acquired his dominance over American legal thought, his method of simply putting these two incompatible notions side by side in the same definition, has prevailed. Now it is possible to construct a doctrine of restraints on the popular will in the interest of justice or reason; and it is also possible to construct a doctrine that what the people want whether it be just or not should prevail as law. But the combination of the two in the theory that law which judges make is

both just and the will of the people, is a logically impossible feat.

The doctrine that whenever a court declares a legislative enactment unconstitutional it merely declares the will of the people, implies of course that the legislature in the act in question plainly disregarded the will of the people. But the promptness with which, in our state for instance, constitutional decisions are recalled by amendment to the constitution, as for instance *People* v. *Coler,* or the Ives case, shows that the legislature was a better judge of what was the actual will of the people. And if we shift the issue to the time of the adoption of the constitution, the retort can still be made that when the state constitution was adopted, probably not one in ten thousand thought of a Workmen's Compensation Law, but that if the matter had been explained to people then they would in all likelihood have been in favor of it in 1894 as they showed themselves in favor of it in 1912. If any one were to suggest to a court of law that before giving a decision on a constitutional point it should institute an inquiry into the actual will of the people, the suggestion would rightly be treated as absurd. Courts must decide in the interest of justice, and not in accordance with the changing will of the majorities; but if courts did always decide cases in accordance with their view of justice, irrespective of the supposed will of the people, their decision would often, as in the Ives case, have been different.

Out of this dilemma between two masters, justice and the will of the people, our publicists try to escape by drawing a sharp distinction between the capricious will of the majorities as shown in elections and the deliberate solemn will of the people as embodied in constitutions or fundamental laws. This distinction, however, is entirely *a priori* and not at all grounded on fact. There is no actual evidence to show that people are more deliberate and solemn when they adopt a constitution than when they vote for local representatives. As a matter of fact, statistics show that fewer people are interested in voting for or against

a state constitution than in voting for or against party candidates.

As a historic fact it cannot be denied that the vast body of constitutional law has been made by our courts in accordance with their sense of justice or public policy, and Chief Justice Marshall is rightly regarded as one of the creators of our federal constitution. The whole theory of police power is a judicial convention. The term does not occur in our constitutions, and not one man in ten thousand knows its precise limitations. As our most conservative journalists admit, our constitutional courts are continuous constitutional conventions, except that their decisions do not need ratification by the people. People as a rule are willing to let elected or appointed judges exercise supreme legislative power so long as this power is exercised wisely in accordance with what people feel to be the real public interest. Thus, when our Court of Appeals declared parts of the infamous Levy Primary Bill unconstitutional, there was a general acquiescence; and if a logician had tried to show that there is no single clause in our state constitution necessitating that decision, he would have received scant hearing from the great mass of the voters. People generally do not care much about the question of usurpation of power. They are interested not in the archaeologic problem how a given power arose, but in the practical question, how it is exercised. Forms of government are doubtless important, but modern political science treats them as instruments for the achievement of social ends. The great difficulty with the prevailing legal theory is that these forms are treated entirely on *a priori* grounds altogether apart from the realities of human experience.

The scientific study of law shows that at all times law is developed through judicial decisions, in which judges are aided by counsel and text writers. Legislatures are the commissioners of warring social interests. They can draw up general treaties of peace, but the details have at all times been and must be inserted by the courts, else we should have a constant recurrence to a state of lawlessness.

When I pointed this out in a recent essay, the deans of some of our largest law schools wrote me that while the contention that judges do have a share in making the law is unanswerable, it is still advisable to keep the fiction of the phonograph theory to prevent the law from becoming more fluid than it already is. But I have an abiding conviction that to recognize the truth and adjust one's self to it, is in the end the easiest and most advisable course. The phonograph theory has bred the mistaken view that the law is a closed, independent system having nothing to do with economic, political, social, or philosophical science. If, however, we recognize that courts are constantly remaking the law then it becomes of the utmost social importance that the law should be made in accordance with the best available information which it is the object of science to supply. Law deals with human affairs, and it is impossible to legislate or make any judgment with regard to them without involving all sorts of assumptions or theories. The issue, therefore, is not between a fixed law on the one hand, and social theories on the other, but between social theories unconsciously assumed and social theories carefully examined and scientifically studied. What provision does our legal system make for the triumph of the more scientific theories? When questions come up involving consideration of the best interest of society, how are judges to decide? At present they decide according to the best of their own knowledge and experience. But this, in the light of the complicated demands on our judiciary, in which all sorts of technical knowledge are involved, can hardly be always adequate. We let arbitrators, who are more or less specialists in the matter, sit for months to determine a single case. Yet we expect judges, with long calendars of all sorts of cases, without power to initiate inquiry and without power to call in experts to advise them, to settle all these matters satisfactorily. In ancient times it was comparatively easy for the court to take judicial notice of the established religion, the established Aristotelian philosophy, and various established customs of the

realm, but now the various matters that the law tries to regulate are objects of expert study, and these studies are making such rapid progress that only experts can competently keep up with them. Hence, when courts, relying on ancient theories of economics about the value of competition, freedom of contract, private property, etc., assume these theories as true, they become the object of ridicule on the part of those who for good scientific reasons have abandoned the ancient views.

## III. The Theory of Natural Rights.

The conflict between the teachings of social science and the results of judicial decision arises almost entirely because of the way the courts interpret the provisions of our Bill of Rights. In the course of the struggle against the claims of the British Parliament, and under the influence of the then fashionable theory of natural law, our Colonial publicists confused certain statutory and common-law rights of Englishmen with the natural rights of man. This led to the insertion of bills of rights into our state and federal constitutions, and hence to the perpetuation of the historically baseless theory that these rights represent the principles of the social compact and are declarative of the principles of all free government. Thus, when all students of history and political science have given up the ancient theories of inalienable natural rights, American courts still speak of the natural right to take property by will, or think of employers as having the natural right to make their employees utterly dependent upon them by paying them in truck or company-store orders, or prohibiting them from joining trade unions, etc.[17] Lawyers like Richard Olney and Roscoe Pound, as well as students of social science, have pointed out the intellectual poverty and narrowness of vision which underlies these conceptions. I can merely add

[17] *Nunemacher* v. *State*, 129 Wis., 190; *State* v. *Goodwill*, 33 W. Va., 179; *Adair* v. *U. S.*, 208 U. S. 161, 175. On the last see the comments of former Secretary of State Olney in the *American Law Review*, 1908.

that in most cases these decisions show ignorance of what ought to be well known legal history. Thus courts frequently speak of trial by jury as an Anglo-Saxon right, when as a matter of fact it was introduced by the Norman kings to raise more revenue. A slight familiarity with legal history also shows that the free transfer of property by will is a comparatively modern institution in the world's history and was not fully legalized in England before the reign of Henry VIII. The notion of the free labor contract is also an historical myth. There never was a time when the relation between master and servant was not the subject of governmental regulations, except that formerly they were almost invariably and openly in the interests of the employers.

Nor are our courts more fortunate when they leave the realm of *a priori* history and defend their conception of natural rights on ground of justice or public interest. Such maxims as "that government is best which governs least" can be defended only on a doctrinaire mixture of political pessimism with economic optimism—a Calvinistic conception of total depravity of man's political nature and an abounding grace through man's unregulated economic activity. Such a doctrine is, to put it mildly, very questionable. Even the most servile acceptance of the old Manchester theories of *laissez-faire* cannot convince people of the value of freedom of contract where the laborer because of economic pressure has no real freedom. To speak of the laborer making his free contract with a railway company or an organization like the U. S. Steel Co. is to do violence to facts well known to every man in the street. Laborers make no free contracts under these circumstances. They obtain jobs on terms prescribed by the companies. If official proof of this fact be necessary the evidence before the Industrial Commission is ample.

I ought to add that I am not one of those who believe that all government regulation is necessarily just; and I have on various occasions contended that there is an element of truth in the old theories of natural rights if we

divest them of their individualistic and contractualistic eighteenth-century setting. But I doubt very much whether the terms of our bills of rights are such as to be capable of being developed into definite laws by judicial process. Over a century of judicature has left such phrases as due process, public purposes, equal protection of laws, just compensation, republican form of government, etc., still so vague that we may well ask whether these are not really moral and political maxims of the kind that had better be left to enforcement by legislative process, controlled by enlightened public opinion. Other liberty-loving nations have put bills of rights into their constitutions, but they have regarded them rather as guides to their legislatures. They have as much faith in their legislatures as we have in our courts. Indeed, why should courts alone be deemed worthy of trust? Europeans generally feel it is safer to leave certain matters to the legislature, because the latter has greater resources of information, does not have to make all its legislation retroactive, and being more representative of the different elements of the state, is more responsive to popular need.

To American lawyers the existence of civilized government without legal (*i.e.*, judicial) restraints on the legislature seems an impossibility. But familiarity with the government of England, France, and Switzerland, and indeed with our own liquor legislation, shows that legal restraints are frequently not as effective as political and general moral restraints. Certainly respect for law is not as well developed, nor crime as infrequent, here as it is in England. Life and property are certainly as safe in France and Switzerland as they are in this country. To be at the mercy of legislative majorities seems a horrible nightmare to the American jurist. But why should it be inherently worse than to be at the mercy of judicial majorities? A change of opinion on the part of a single judge after the rehearing in the Income Tax case in 1895 dislocated our whole revenue system, brought about grave crises in government finances, and necessitated a tariff policy different

from that which would have been followed if the original decision had remained.

Orators, more interested in national edification than in painful accuracy, speak of our form of government by written constitution as the envy of all other peoples, but though the American system has been thoroughly studied abroad, the doctrine of judicial supremacy has not commended itself to other nations. The Germans and Swiss, for instance, copied several features of the federal system, but they did not think it advisable to give the federal courts any such authority as we give ours. Those who know us best, like the English, or the great British self-governing colonies have never evinced the least desire to adopt our method of government by bills of rights interpreted by courts. When the Home Rule Bill for Ireland was considered, it was suggested that something like our bill of rights be inserted; Premier Asquith, then, with all the restraint that the responsible head of a friendly government must have felt, was compelled to point to American experience as an expressive warning against such an attempt.

[The language of the proposed insertion is] "full of ambiguity, abounding in pitfalls and certainly provocative of every kind of frivolous litigation. . . . What is 'equal protection of the laws?' What is 'just compensation?' In everyone of these cases you have adjectives. . . . [Questions raised by those adjectives] are really matters of opinion, bias, or inclination and judgment which cannot be acted on under anything like settled rules of law."[18]

"To introduce the American system," said the *Manchester Guardian* on that occasion, "would choke the courts with litigation (as it does in America). No sooner would a law be enacted than lawyers would grow rich by resisting its enforcement upon constitutional grounds." "All administration would be checked in the American fashion," adds the *London Chronicle*, "while laws were tossed from court to court for years in a vain effort to ascertain whether

[18] Par. Debates, Commons, 1912, XLII p. 2230 f.; the following quotations are from *Current Literature*, Vol. LIII., pp. 629 f.

or not they need be enforced. The trouble with the constitution of the United States is that nobody has ever been able to find out what it means."

The *London News* contained the following:

"No act of Parliament could be passed which might not be taken before the courts for them to decide whether or not it was constitutional. The courts would be in Ireland, as they are in the United States, the supreme legislators for the whole field of social and economic life. . . . Judges are not trained for that kind of function, and no man who knows the history of the exercise of this function by American judges but will agree that it would erect one of the most galling of all possible tyrannies."

Against the charge that the bills of rights produce too great a strain on the judicial power, that they are essentially vague and productive of an enormous mass of litigation and legal uncertainty, the defenders of our juristic system bring only *a priori* arguments. Thus they argue as if all restraints are inherently good. I doubt, however, whether a single ethical philosopher, or for that matter, anybody else, really considers self-restraint in itself a good. If I have the impulse to say a kind word or do a kind deed, there is nothing admirable about restraining myself. Self-restraint is a good only when applied to impulses which lead to vicious results. There is nothing virtuous about the self-restraint of the villain who subordinates all his better impulses to one vicious purpose, and the same considerations apply to national action. A good deal of the Spartan self-restraint was vicious and destructive of finer manhood. Doubtless hasty action is likely to be regretted and, in general, habits of reflection and deliberation before acting are good, provided we do not carry this deliberation to the extent of losing all opportunity to act. For nations, like individuals, must frequently make up their minds quickly if they are to grasp their opportunity and act at all. If I tie a heavy stone around my neck I shall doubtless not be able to run and, therefore, may save myself from the risk of falling. But neither shall I be able to save myself

when my house is on fire. I see no reason for assuming an inherent probability that modern legislatures will act too quickly rather than that they will act too slowly. But even so, greater mobility might be considered an advantage, since it enables the legislature to correct mistakes more readily. At any rate, the defenders of the doctrine of constitutional restraints ought to rely more on actual instances where the exercise of constitutional restraints has actually led to wiser and more deliberate legislation. It is notable that, in the two cases which have aroused the most discussion in the last twenty years, the Federal Income Tax decision in 1895 and the Ives case in this state, no one contended that the delay of eighteen years in one case and of four in the other, achieved any socially desirable end. If constitutional restraints are to be justified, they must, like other human works, be justified by their actual fruits in human experience. The only argument from experience that I am familiar with in this connection is the argument from prosperity. Our American system must be the best, it is said, because under it we have prospered as no other nation ever did. But the form of this argument seems too much like the fallacy of *post hoc ergo propter hoc.* Because prosperity has followed the adoption of our peculiar constitutional regime, it does not follow that the latter is the cause. It may well be that the unparalleled abundance of natural resources and our social rather than political democracy is the main cause. Moreover, it is an open question whether a less individualistic theory of government would not have reduced the frightful waste of our natural resources, of which we have only lately become aware. The theory that each man has absolute rights over his own property is not sufficient to compel men to co-operate for the common good, and only by such co-operation can a comprehensive policy, such as irrigation, be carried through. Finally, the argument from past prosperity is a very dangerous one because of its partisan character. It appeals only to those who are satisfied with their share of the prosperity.

The business of a philosopher is well done if he succeeds

in raising genuine doubts. It is the business of the statesman and the lawyer to resolve these doubts. But though practical matters are beyond my competence, I venture to suggest that the constitutional law of our bills of rights will never receive a fair chance to demonstrate its usefulness until we get rid of the chaos of nearly fifty courts interpreting independently the provisions of the bills of rights of their state constitutions, though the latter are identical in substance with the fourteenth amendment to the federal constitution. The suggestion to strike out the bill of rights from our state constitution sounds like a revolutionary proposal. Yet it is in all seriousness a conservative measure well calculated to strengthen the respect for law in the community. For consider, this proposal in no way endangers the substantive rights now protected by the existing bills of rights in our state constitutions. These are amply protected by the fourteenth amendment to the federal constitution. The presence of the same provision in the state and federal constitutions only serves to produce confusion. Thus, in the Ives case, the question of due process was considered under the state but not under the federal constitution. But if the phrase "due process" has a definite meaning, how can we say that it has a different meaning in the federal constitution than in the state constitution? Moreover, the practical inconvenience arises that a subsequent amendment to the state constitution reopens the whole question in the form: Does such amendment violate the due process clause of the federal constitution? The present situation also puts the courts in an embarrassing situation. If they decide a question on the due process clause of the state instead of the federal constitution, ill-disposed persons may suspect that they are afraid or disinclined to have their decisions reviewed by the Federal Supreme Court. Unless there is any reason why we cannot trust the Federal Supreme Court to enforce our constitutional rights, there seems no reason why these rights should be put in a state constitution which cannot always be reviewed by the federal courts, and thus produce the chaos

of nearly fifty courts all interpreting the same phrases in different ways. If a uniform system of constitutional law has any value at all, it would seem most advisable that the rights in question should be put in a form which will give the Federal Supreme Court an opportunity to enforce such uniformity.

I cannot conclude, however, without at least mentioning the most fundamental question, viz., whether the lawyer can adequately serve his high calling so long as he regards it as his duty simply to defend the established system? Law is one of the essential arts of civilization. Its business is to create pathways through the primitive jungle of human passions and impulses. Like dykes or river works legal forms provide or safeguard the channels through which the fitful floods of life may usefully pass. Hence the lawyer who regards his work as a liberal profession rather than as a commercial trade, must not be satisfied with merely guarding the works which have been handed over to him. He must study the stream of life and be constantly thinking of ways of improving the containing legal forms. The finest traits of the American spirit have been expressed by Emerson: "Why should we grope among the dry bones of the past, or put the living generation into masquerade out of its faded wardrobe? The sun shines to-day also. There is more wool and flax in the fields. There are new lands, new men, new thoughts. Let us demand our own works and laws and worship." We too are men, and we ought to live not as pall bearers of a dead past but as the creators of a more glorious future. By all means let us be loyal to the past, but above all loyal to the future, to the Kingdom which doth not yet appear.

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